NG CHIA WEI v. AIR ASIA BHD & ORS

HIGH COURT MALAYA, PULAU PINANG
AZMI ABDULLAH JC
[CIVIL APPEAL NO: PA-12A-8-02-2018]
1 NOVEMBER 2018

CIVIL PROCEDURE: *Proceedings – Duplicity – Claimant lodged complaint with Industrial Relations Department for wrongful and/or unfair dismissal by employers – Matter referred to Industrial Court – Claimant sought damages against employers on basis of tort of conspiracy at Sessions Court – Whether there was duplicity of proceedings – Whether claims based on same causes of action – Whether claim could lead to unjust enrichment – Whether claimant's statement of claim at Sessions Court ought to be struck out – Rules of Court 2012, O. 18 r. 19(1)(b), (d)*

CIVIL PROCEDURE: *Jurisdiction – Courts – Claimant lodged complaint with Industrial Relations Department for wrongful and/or unfair dismissal by employers – Matter referred to Industrial Court – Claimant sought damages against employers on basis of tort of conspiracy at Sessions Court – Whether there was duplicity of proceedings – Whether Industrial Court's jurisdiction and function separate and distinct from Sessions Court – Whether remedy and relief, which Industrial Court may award, different from what Sessions Court may award*

In December 2016, the appellant ('the plaintiff') lodged a complaint with the Industrial Relations Department ('IRD') for wrongful and/or unfair dismissal by the respondents ('the defendants'), pursuant to s. 20 of the Industrial Relations Act 1967 ('IRA'). In August 2017, the plaintiff claimed for exemplary and aggravated damages against the defendants, jointly and severally, at the Sessions Court, on the basis of tort of conspiracy. The plaintiff's complaint to the IRD was referred to the Industrial Court sometime in August 2017. At the Sessions Court, the defendants successfully struck out the plaintiff's statement of claim, pursuant to O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012, on the grounds that there was a duplicity of proceedings as the plaintiff's claims at the Sessions Court and the Industrial Court were of the same nature. Hence, the present appeal. The issues that arose for adjudication were (i) whether the Industrial Court's jurisdiction and function were separate and distinct from the Sessions Court; (ii) whether the remedy and relief, which the Industrial Court may award in the plaintiff's claim, were different from what the Sessions Court may award; (iii) whether the two claims were the same or whether they were based on different causes of action; and (iv) whether the claim could lead to unjust enrichment.

Held (allowing appeal):

(1) The plaintiff's claim at the Industrial Court was for reinstatement and back wages, which were under the sole jurisdiction of the Industrial Court. The Sessions Court had no jurisdiction to entertain a claim for reinstatement. It is only when reinstatement is not possible that the Industrial Court would grant compensation *in lieu* of reinstatement. The plaintiff's claim at the Sessions Court was for damages for conspiracy and negligence, both of which causes of action which the Industrial Court had no jurisdiction to grant damages. (paras 18 & 19)

(2) The plaintiff's claim at the Sessions Court was distinct from the Industrial Court case. The plaintiff's cause of action at the Industrial Court was for wrongful and/or unfair dismissal. The issues involved were (i) whether the purported retrenchment was genuine; and (ii) whether the termination of his employment was with/without just cause. Meanwhile, at the Sessions Court, the plaintiff was seeking common law remedy for his wrongful dismissal where his claim for damages for conspiracy and negligence, which were causes of actions in tort. The elements needed to be established and the issues involved were completely different from that of the Industrial Court case. (paras 20-23)

(3) The two proceedings were based on two different causes of action against different defendants. Two separate and distinct rights of the plaintiff have been breached. There was no overlapping of damages. In fact, since there were different causes of action, even after the plaintiff had obtained judgment or award in one case, he would still be able to proceed with his claim in the other case because the cause of action, being a different one, would not be merged in the judgment or award. (paras 31 & 32)

(4) There was no duplicity of proceedings just by the reason of the two suits sharing the same underlying facts. The suit could not be deemed to be obviously unsustainable without the deliberation of a full trial pertaining to the actions and conducts of the defendants. The Sessions Court order was set aside with the effect of reinstating the plaintiff's claim at the Sessions Court. (paras 26, 41 & 43)

Case(s) referred to:

Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors [2008] 6 CLJ 473 CA ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case [1987] 1 CLJ 572; [1987] CLJ (Rep) 472 HC ***(refd)***

Barbara Lim Cheng Sim v. Uptown Alliance (M) Sdn Bhd & Ors [2013] 5 CLJ 488 HC ***(refd)***

Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors [2011] 5 CLJ 481 FC ***(refd)***
Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(refd)***
Edward Goh Geok Seng v. Dunstan Dumpangol & Ors [1988] 1 LNS 228 HC ***(refd)***
Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors [1980] 1 LNS 156 FC ***(refd)***
HT Maltec Consultants v. Malaysian Resources Corporation Bhd & Ors [2015] 1 LNS 68 HC ***(refd)***
Kempas Edible Oil Sdn Bhd v. Prabdhial Singh Dardara Singh [2015] 7 CLJ 203 CA ***(refd)***
KMS Builders Sdn Bhd v. Hazama Corporation [2002] 8 CLJ 553 HC ***(refd)***
Koperasi Pos Nasional v. Hafsah Mohd Tahir [2003] 8 CLJ 209 HC ***(refd)***
Maybank Investment Bank Bhd v. Hamzah Mahmood & Anor [2011] 1 LNS 643 HC ***(refd)***
Milan Auto Sdn Bhd v. Wong Seh Yen [1995] 4 CLJ 449 FC ***(refd)***
Mooney & Ors v. Peat, Marwick, Mitchell & Co & Anor [1966] 1 LNS 109 HC ***(refd)***
Perbadanan Perwira Harta Malaysia & Anor v. Mohd Baharin Hj Abu [2010] 6 CLJ 1 CA ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(refd)***
Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor [2016] 3 CLJ 1 FC ***(refd)***
Yeoh Eng Kong v. Choo Kok Yeow & Anor [2016] 3 CLJ 794 CA ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20
Rules of Court 2012, O. 18 r. 19(1)(b), (d)

For the plaintiff - YC Wong; M/s YC Wong
For the defendants - Sebastian Tay Hanxin; M/s Lee Hishamuddin Allen & Gledhill

Reported by Najib Tamby

JUDGMENT

Azmi Abdullah JC:

Introduction

[1] The parties herein will be referred to according to the titles designated to them in the Sessions Court. This is the plaintiff's appeal against the Sessions Court's decision dated 13 February 2018 allowing the defendants' application to strike out the plaintiff's statement of claim essentially on the argument of duplicity of action by plaintiff as notwithstanding his action against the first and second defendants in the Industrial Court under s. 20 of the Industrial Relations Act 1967, the plaintiff has also instituted the action before the Sessions Court against the same two defendants together with five other defendants.

[2] This court in hearing the appeal, after perusing the written submissions of both parties and further oral clarifications being made, decides on 15 August 2018 to allow the appeal and sets aside the decision of the learned Sessions Court Judge.

[3] Dissatisfied with the decision made, the defendants have filed an appeal to the Court of Appeal hence the writing of the grounds for the decision derived at by this court.

Background Facts

[4] The defendants' application has been made under O. 18 r. 19(1)(b) and/or (d) of the Rules of Court 2012. Their sole ground of application is duplicity of proceedings. Their averment is that the plaintiff's claim overlaps with his claim in the Industrial Court against the first and second defendants. In their application, they are not challenging the truth of any of the averments made in the statement of claim.

[5] Hence, all the averments in the plaintiff's statement of claim made be presumed to be true as derived from *Mooney & Ors v. Peat, Marwick, Mitchell & Co & Anor* [1966] 1 LNS 109; [1967] 1 MLJ 87.

[6] The plaintiff's pleaded case are as follows:

(a) The plaintiff was under the employment of the second defendant, and in substance, the first defendant which owns 100% of the second defendant. The first and second defendants operated as one unit. Arising from the plaintiff's excellent performance, he was appointed as the acting head of procurement in August 2016 and subsequently promoted as the head of procurement on or about 1 November 2016.

(b) The third to seventh defendants were at all material times employees of the first and second defendants, each heading separate departments.

(c) The third to seventh defendants unlawfully conspired with each other and/or other persons whose identities are uncertain to the plaintiff ("the other conspirators") as well as the second defendant's then CEO Naresh Alagan to oust the plaintiff from his position as the acting head and thereafter as the head of procurement and/or damage or destroy the plaintiff's employment with the predominant purpose of injuring the plaintiff.

(d) Pursuant thereto, the said defendants and/or the other conspirators wilfully and wrongfully did, *inter alia*, the acts set out in para. 16 of the statement of claim. They conspired together to create a scheme to oust the plaintiff by way of a sham restructuring and retrenchment in order to pave the way for the third defendant to take the plaintiff's position under the guise of a new departmental head.

(e) The first and second defendants were involved in the conspiracy directly and/or vicariously. They also breached their duties to the plaintiff in allowing or participating in or instructing the act or acts specified in para. 16 of the statement of claim.

(f) On 2 December 2016, the plaintiff was forced to leave his job place immediately in an utmost stressful and embarrassing atmosphere, watched by his team members and other staff of the second defendants. His dignity and reputation were destroyed. He lost his employment and livelihood at the age of 43. He suffered damage to his economic expectations, loss of reputation, stress, anxiety and inconvenience, as well as injury to his feeling.

(g) The plaintiff lodged a complaint with the Industrial Relations Department for wrongful and/or unfair dismissal pursuant to s. 20 of the Industrial Relations Act 1967 on 20 December 2016. The defendants retaliated maliciously, and by their wrongful acts as set out in para. 23 of the statement of claim, they destroyed the plaintiff's opportunity to obtain another permanent job with Dell Computers.

(h) The plaintiff filed the suit in the Sessions Court in August 2017, claiming damages for conspiracy, including exemplary damages and aggravated damages against all the defendants jointly and severally. He also claims damages against the first and second defendants for negligence.

(i) The plaintiff's complaint to the Industrial Relations Department has been referred by the Minister to the Industrial Court under case no: 18/4-1316-17 sometime in August 2017. All the defendants are averring in this application to strike out is that there is a duplicity of proceedings because the plaintiff's claims herein and in the Industrial Court are of the same nature.

(j) Upon reading the submissions of both parties, on 13 February 2018, the Sessions Court allowed the defendants' application to strike out the plaintiff's statement of claim hence this appeal.

Guiding Principles

[7] Order 18 r. 19(1) of the Rules of Court 2012 lays down as follows:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement, of any writ in the action, or anything in any pleading or in the endorsement, on the ground that:
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[8] The authority of the court to dismiss an action summarily is a drastic one. The court will only strike out a claim in plain and obvious cases and where the claim is obviously unsustainable on the face of it. So long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out. This is clearly enunciated in the often-quoted precedent of *Bandar Builder Sdn Bhd & Ors. v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7.

[9] The test of "obviously unsustainable" in *Bandar Builder (supra)* was elaborated by the Federal Court in *Seruan Gemilang Makmur Sdn Bhd v. Kerajaan Negeri Pahang Darul Makmur & Anor* [2016] 3 CLJ 1 as follows:

> [58] The "obviously unsustainable" test as adopted in *Bandar Builder (supra)*, would ensure fair trial and access to the court to litigants. The respondents (the plaintiffs) should be given their day in court to prove their case. The court should not strike out an action purely or for the simple reason that it is "unsustainable". **The degree of "unsustainability" must be higher, ie, it must be "obviously unsustainable" before the action can be struck out summarily.** The court should not pull its shutter down. (emphasis added)

[10] The Federal Court held in the case of *Blue Valley Plantation Bhd v. Periasamy Kuppannan & Ors* [2011] 5 CLJ 481 that when there is any doubt whether that discretion to strike out should be exercised, such application should be dismissed.

[11] In *Ahmad Jefri Mohd Jahri v. Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 6 CLJ 473, the Court of Appeal held:

> ... It is trite law that it is only in conspicuously unsustainable cases that a pleading generally and a claim specifically would be struck out under any limb of Order 18 rule 19(1) and such power would only be exercised by the court sparingly ...

[12] In *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886, the High Court held:

> ... A case should only be stuck out if it is obviously unsustainable. The operative word is not "unsustainable" but "obviously". Which denotes that on the face of it the claim is evidently unsustainable in law.
>
> Upon the available affidavit evidence, the Plaintiff's action could not be said to be obviously unsustainable. There were issues, both of fact and law, that had to be tried.

[13] In *HT Maltec Consultants v. Malaysian Resources Corporation Berhad & Ors* [2015] 1 LNS 68; [2015] 5 AMR 607, these principles were enumerated in adopting the stance of the superior courts pertaining to such an application:

(a) a pleading can only be struck out in a plain and obvious case namely where that pleading is obviously unsustainable – the Supreme Court's judgment in *Bandar Builder & 2 Ors v. Malayan Banking Corporation Bhd* [1993] 2 AMR 1969 at 1975; 3 MLJ 36 at 43,

(b) the mere fact that a pleaded case is weak and not likely to succeed, is not a ground to strike out that pleading – *Bandar Builder Sdn Bhd* at page 1976 (AMR); p 44 (MLJ);

(c) the court will assume that the contents of the pleading in question are true – the Court of Appeal's decision in *Tuan Hj Ishak b Ismail v. Leong Hup Holdings Bhd (and Other Appeals)* [1996] 1 AMR 300 at 323; [1996] 1 MLJ 661 at 679;

(d) every Malaysian citizen has a constitutional right of access to justice under Article 5(1) of our Federal Constitution – the Federal Court's judgment in *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 2 AMR 301 at 313; [2010] 3 CLJ 507 at 514-515. Unless a suit is obviously unsustainable, I will be reluctant to deprive a Malaysian citizen of his or her fundamental right of access to justice.

Issues Raised

[14] The plaintiff argues that the plaintiff's claim is not obviously unsustainable with the defendants' allegation of duplicity of proceedings being misconceived. This court shall examine these issues in deciding:

(i) The Industrial Court's jurisdiction and function are separate and distinct from the Sessions Court. The remedy and relief which the Industrial Court may award in the plaintiff's claim therein are different from what the Sessions Court may award.

(ii) The two claims are based on different causes of action.

(iii) The parties in the two claims are not the same.

(iv) Whether the claim leads to unjust enrichment.

(i) Jurisdiction Of The Industrial Court

[15] The Industrial Court is a creature of the Industrial Relations Act 1967 ("the IRA"). Hence, its powers must be discovered only from the four corners of the IRA. Its jurisdiction is limited to the terms and subject matter of the reference by the Minister. This is because the threshold jurisdiction of the Industrial Court is conferred by the Minister's reference and the court has no jurisdiction to change the scope of the reference.

[16] In *Milan Auto Sdn Bhd v. Wong Seh Yen* [1995] 4 CLJ 449, the Federal Court held that the function of the Industrial Court on dismissal cases was two-fold, namely to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal.

[17] The function of the Industrial Court was also explained at length by the Court of Appeal in *Kempas Edible Oil Sdn Bhd v. Prabdhial Singh Dardara Singh* [2015] 7 CLJ 203.

[18] The plaintiffs claim in the Industrial Court is for reinstatement and back wages which are under the sole jurisdiction of the Industrial Court as decided in *Koperasi Pos Nasional v. Hafsah Mohd Tahir* [2003] 8 CLJ 209. It is only when reinstatement is not possible under the circumstances that the Industrial Court will grant compensation *in lieu* of reinstatement. The Sessions Court has no jurisdiction to entertain a claim for reinstatement as held in *Perbadanan Perwira Harta Malaysia & Anor v. Mohd Baharin Hj Abu* [2010] 6 CLJ 1, CA.

[19] From the statement of claim of the case, the plaintiff's claim in the Sessions Court is for damages for conspiracy and negligence, both of which are causes of action in tort which the Industrial Court has no jurisdiction to grant damages to the plaintiff for such claim.

[20] In allowing the striking out, the Sessions Court has failed to appreciate that the plaintiff does not claim damages for wrongful dismissal in his statement of claim (see para. 25 of the statement of claim) (record of appeal at pp. 49-50). The plaintiff herein is not seeking for common law remedy for his wrongful dismissal in the Sessions Court whereby his claim is for damages for conspiracy and negligence which are causes of actions in tort.

[21] Hence the plaintiff's claim in the Sessions Court is distinct from the Industrial Court case.

(ii) Different Causes Of Action

[22] The plaintiff's cause of action in the Industrial Court is for wrongful and/or unfair dismissal. The issues involved are whether the purported retrenchment was genuine, and whether the termination of his employment was with or without just cause.

[23] His causes of action in the Sessions Court are the tort of conspiracy and negligence. The elements needed to be established and the issues involved are completely different from that of the Industrial Court case.

[24] In *KMS Builders Sdn Bhd v. Hazama Corporation* [2002] 8 CLJ 553 at p. 571 para. d to p. 572 para. e, the court dismissed the defendant's application for striking out and stated, *inter alia*, as follows:

> *It is obvious that the argument raised by the defendant of duplicity of proceedings is devoid of merit, because the cause of action by the defendant against the plaintiff in the writ action is markedly different from the orders prayed for by the plaintiff against the defendant herein.* Although in the writ action, the plaintiff would be required to stay the proceedings therein there is an overlap of issues to be decided, the plaintiff in the writ action is merely thwarting further

proceedings against a claim for monies by the defendant whereas in the OS, the plaintiff is seeking declarations on the effect of the Arbitration Clause and appointment of arbitrator pursuant to s. 12 of the Arbitration Act 1952. It is clear as night and day that the OS and writ action are totally different in nature and there is no duplicity of proceedings. In the case of *The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor* [1996] 4 CLJ 828 the court held:

(5) The basis of multiplicity of actions for the motion is devoid of merit since the issues were all different and they were between either of the respondents in the hearing of the petition (see p. 219C).

...

... although there are some ancillary issues which overlap (ie, the issue on the arbitration clause), this alone will not entitle the defendant to succeed in striking out. The OS and writ action are all pending in the High Court though due to administrative arrangements they are to be heard before different judges. Secondly the prayers and issues raised in the writ action has not been determined on its merits and the merits are to be resolved by arbitral proceedings. Henceforth it is not an abuse of process by filing the OS herein. (emphasis added)

[25] In *Edward Goh Geok Seng v. Dunstan Dumpangol & Ors* [1988] 1 LNS 228; [1989] 2 MLJ 119, the High Court held that merely because same prayers have been asked for and substantially the same issues have been raised in both suits, this alone does not entitle the defendants to succeed to strike out the plaintiff's case, other factors have to be looked into as well. The court looked at several factors, *inter alia*, that none of the prayers and issues raised in the suits have been determined on merits.

[26] From the authorities it can be gathered that there was no duplicity of proceedings just by the reason of the two suits sharing the same underlying facts. The causes of action were different in nature and the remedies sought for were entirely different.

[27] In *Maybank Investment Bank Berhad v. Hamzah Mahmood & Anor* [2011] 1 LNS 643, the defendant was allowed to claim damages for breach of contract in the civil court despite having a pending claim in the Industrial Court. The court also held that there was no duplicity as the defendant was claiming for different remedies under the two suits. It was held at para. 3.8 as follows:

On Issue 1, the Court is of the view that the addition of the 1st Defendant's Counterclaim for *damages for breach of contract should be allowed notwithstanding that the 1st Defendant has a pending claim against the Plaintiff in the Kuala Lumpur Industrial Court. The Court holds this view as there does not appear to be any duplicity in the claims of the 1st Defendant. In the Industrial Court the 1st Defendant is claiming for statutory remedy of "reinstatement to his former position in the Company without loss of any benefits monetary or otherwise*

A *whatsoever under Section 20 of the Industrial Relations Act 1967", whereas in his Counterclaim the 1st Defendant is claiming under common law for general damages arising from the breach of contract by the Plaintiff.* A civil claim for damages for wrongful dismissal has been recognised in the case of *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1981]1 MLJ 238 where the Federal Court held that "in the case of a claim for wrongful dismissal,
B a workman may bring an action for damages at common law." The decision in *Fung Keong* was followed in the case of *Shamsulbahri Shaffie v. Titan Petchem (M) Sdn Bhd* [2010] 4 CLJ 242 where the Court held that the plaintiff in a claim for a declaration that his purported dismissal by the defendant was wrongful was not in any way restricted to bring an action in a civil suit as opposed to by way of representations to the Industrial
C Court under Section 20 of the Industrial Relations Act 1967. However, such a claim was restricted to damages as provided for under the common law. (emphasis added)

[28] It is also discovered that where claims had been filed in the Industrial Court as well as the civil court, parties tended not to raise the objection of
D duplicity. For example, in the case of *Barbara Lim Cheng Sim v. Uptown Alliance (M) Sdn Bhd & Ors* [2013] 5 CLJ 488, the plaintiff brought an action against the defendants for damages for, *inter alia,* slander and conspiracy to injure arising from her unlawful dismissal. She also sought relief in the Industrial Court for the claim for unlawful dismissal. The issue of duplicity
E of proceedings was not raised as they were based on different causes of action.

(iii) Different Parties Named

[29] There are seven defendants in this suit whilst in the Industrial Court
F case, the sole respondent is the second defendant herein. The first defendant has been joined as a co-respondent in the Industrial Court case pursuant to a recent order for joinder dated 4 April 2018. The rest of the defendants cannot be added as respondents in the Industrial Court case as they are not the "employer".

G **[30]** It is trite law that when a wrong has been done by several parties either jointly or severally to another party, that party is entitled to file a claim against all or any one or more of the wrongdoers. Since the third to seventh defendants cannot be joined as parties in the Industrial Court, it is apt that a separate action be brought against them in a civil court.

H *(iv) No Unjust Enrichment*

[31] In the defendants' affidavit in reply at pp. 86-91 of the record of appeal, they contend that the plaintiff will be unjustly enriched if two proceedings are to run concurrently however it must be noted that the two
I proceedings are based on two different causes of actions against different defendants. Two separate and distinct rights of the plaintiff have been breached. Hence, there is no resultant overlapping of damages.

[32] In fact, since there are different causes of action, even after the plaintiff has obtained judgment or award in one case, he will still be entitled to proceed with his claim in the other case, because the cause of action in the latter case, being a different one, will not be merged in the judgment or award.

[33] In *Bank Bumiputra (M) Bhd & Anor v. Lorrain Esme Osman & Another Case* [1987] 1 CLJ 572; [1987] CLJ (Rep) 472, the court stated as follows at p. 484 para. g to p. 485 para. d:

> With regard to prayer 2(b)(ii), Mr. Ross-Munro raised a new ground, that is the doctrine of merger. In prayer 2(b)(ii) Lorrain asks the Court to determine whether the plaintiffs can maintain the present action by reason of the matters set out in para. 56, 58 and 59 of his statement of defence. Paragraph 58A(b) of Lorrain's statement of defence states that BMF had sued and obtained judgment in Hong Kong against one of the debtors, CNL in Suit 1983 No. 15133 on 17 July 1984 for the recovery as a debt of the said US$38.5 million and US$1.5 million referred to in the statement of claim. In para. 59, Lorrain avers that the plaintiffs' causes of action in respect of the said US$38.5 million and US$1.5 million loans have merged in the Hong Kong judgment.
>
> Mr. Ross-Munro submitted that the plaintiffs cannot obtain judgment against CNL in Hong Kong and at the same time sue Lorrain for judgment on the said sum because those two rights are inconsistent. These inconsistent rights merged into the judgment.
>
> The question is what is the position of the law relating to merger? When a judgment has been given in an action, the cause of action in respect of which it was given is merged in the judgment and its place is taken by the rights created by the judgment, so that a second action may not be brought on that cause of action. *There will be no merger unless the cause of action is the same in both actions. Halsbury's Laws of England*, 4th Edn., Vol. 26, p. 274. In *Issacs & Sons v. Salbstein & Anor.* [1916] 2 KB 139, Pickford LJ said:
>
> > If the liability is joint, there is only one cause of action, and that becomes merged with the judgment; *if the liability is several, there are two causes of action and there is no merger by reason of the judgment.*
>
> In *Goldrei, Foucard & Son v. Sinclair* [1918] 1 KB 180, the English Court of Appeal held that the plaintiffs were entitled to recover, as there were two causes of action, one against the company for rescission of the agreement and the repayment of the £105, in respect of which fraud was not a necessary element, and the other against both defendants to recover damages for fraud; and that *the judgment against the company and the claim for rescission was no bar to the claim against the first defendant for damages for fraud.*

A *In the instant case, the cause of action in the Hong Kong suit was breach of contract. The cause of action against Lorrain in C438 is breach of fiduciary duty. These are two different causes of action. Furthermore, the defendants are not the same in the two actions. In the Hong Kong suit the defendant was CNL. In C438 the defendants are Lorrain and three others. In the circumstances the doctrine of merger does not apply in the present case.* (emphasis added)

B

[34] The issue of overlapping damages will not arise as the damages to be awarded in this suit arises from a different cause of action in the Industrial Court proceedings as decided in the Court of Appeal case of *Yeoh Eng Kong v. Choo Kok Yeow & Anor* [2016] 3 CLJ 794.

C **[35]** In any event, it is trite law that the plaintiff must prove his damages. If there are overlapping damages as alleged, the court in assessing damages could always take into account the award granted in another case and make such necessary deduction/adjustment to avoid double recovery.

[36] Furthermore, as has been informed to this court, in the Industrial D Court case, until this appeal is argued, the plaintiff/claimant has not filed a statement of case. There is therefore completely no legal or factual basis for the defendants to contend that there is a duplicity of proceedings thus such contention is purely conjecture.

Defendants' Submission

E

[37] The argument of the defendants that once an action is pursued in the Industrial Court, it then prohibits the filing of a civil action is centred on two cases as found at pp. 16 to 18 of the written submission dated 21 May 2018 with the first being *Fung Keong Rubber Manufacturing (M) Sdn Bhd v. Lee Eng Kiat & Ors* [1980] 1 LNS 156; [1981] 1 MLJ 238.

F

[38] However, this court opines that the precedent did not lay down such a position or principle of law. Based on the *ratio* of the precedent found at p. 238, the precedent actually deliberates on the process of pursuing an Industrial Court action and the issue of the civil action not providing for the G relief of reinstatement. The principle in *Fung Keong* is accurately discussed in the case of *Maybank Investment Bank Bhd* found in para. 27 of this writing.

[39] As for the case of *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5; [1981] 1 MLJ 304, again this court finds that it is not supportive of the defendants' argument as it deals with the power of the High Court in quashing the H decision of the Industrial Court should there be an error in law or fact exercised by the Industrial Court.

[40] Hence, the defendants' argument has failed to be accurately substantiated.

I

Conclusion

[41] This court is satisfied that this claim is based on the cause of action of conspiracy allegedly committed by the seven named defendants and thus the suit is definitely more broad-based than the Industrial Court action complaint with different parties and being grounded upon different facets of the law. This court finds that the suit cannot be deemed to be obviously unsustainable without the deliberation of a full trial pertaining to the actions of the third to seventh defendants inter-related to the conduct of the first and second defendants being examined and evidence presented.

[42] It would be unjustifiable to decide on the issues raised and to curtail the plaintiff's action based merely on the affidavit evidence without a recourse to *viva voce* evidence.

[43] This court allows the plaintiff's appeal thus setting aside the Sessions Court's order dated 13 February 2018 with the effect of reinstating the plaintiff's claim in the Sessions Court with costs.